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February 24, 2005

VIA FEDERAL EXPRESS

The Honorable Cathy Catterson
Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103

Re: *United States v. Ameline*, No. 02-30326 (9th Cir.)

Dear Ms. Catterson:

Please accept this letter for filing pursuant to Fed. R. App. P. 28(j). Kindly distribute it to the Court.

The government seeks rehearing en banc of the panel's application of the plain-error standard of review to a forfeited claim under *United States v. Booker*, 125 S. Ct. 738 (2005). With regard to the third prong of the plain-error test – whether the error “affect[ed] [defendant's] substantial rights” – we explained, in reliance on *United States v. Rodriguez*, — F.3d —, 2005 WL 272952 (11th Cir. Feb. 4, 2005), that defendant bears the burden of demonstrating that he likely would have received a lesser sentence under the new advisory Guidelines regime. See Gov't Pet. for Reh'g En Banc (2/17/05) 11-14. We further explained that the panel's conclusion that defendant's substantial rights were affected because he received a sentence beyond the maximum sentence supported by the facts to which he admitted misapprehends the nature of the error in this case. As *Rodriguez* confirms, the error is not the use of judicially-found facts to impose an enhanced sentence; rather, it is the use of such enhancements under a *mandatory* guidelines regime. *Id.* Finally, we noted that

language in the decision suggesting a rule of automatic reversal was erroneous and improper. *Id.* at 18 n.12.

In *United States v. Antonakopoulos*, — F.3d —, 2005 WL 407365 (1st Cir. Feb. 22, 2005), the First Circuit endorsed the government's positions in these respects, holding that:

- the defendant's burden on plain-error review is to show that there is "a reasonable probability that the district court would impose a different sentence more favorable to the defendant under the new 'advisory Guidelines' *Booker* regime," *id.* at *4 (following *Rodriguez*);
- the error "is not that the judge (by a preponderance of the evidence) determined facts under the Guidelines which increased a sentence beyond that authorized by the jury verdict or an admission by the defendant; the error is only that the judge did so in a mandatory Guidelines system," *id.*; and
- the Fourth and Sixth Circuits misapplied the plain error standard by seemingly endorsing an automatic remand rule, *id.* at *8-*9.

Respectfully submitted,

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